



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 70 of 2011

IN THE MATTER OF THE ADVOCATES ACT (CAP 16 OF THE LAWS OF KENYA)

AND

IN THE MATTER OF HIGH COURT SUCCESSION CAUSE NO. 2278 OF 2009

IN THE MATTER OF THE ESTATE OF ALESSANDRO CEMBRAN aka ALEXANDER
CEMBRAN aka ALEX CEMBRAN

AND

IN THE MATTER OF TAXATION OF ADVOCATES & CLIENT BILL OF COSTS

OMAR KEMAL AMIN & CO. ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

SUSANNA RUBBIOLI aka SUSANNA CEMBRAN
AS THE ADMINISTRATOR OF THE ESTATE OF
ALESSANDRO CEMBRAN (DCD).....CLIENT/RESPONDENT

RULING

This application is brought by a Notice of Motion dated 14th July, 2011 and taken out under Sections 45 and 52 of the **Advocates Remuneration Order**, Sections 1A 1B 3 & 3A of the **Civil Procedure Act** and **Order 52 Rule 3** of the **Civil Procedure Rules 2010**. The Applicant thereby seeks the following orders-

1. *That the taxing officer certifies the advocates/client costs payable from Respondent to the Applicant herein as KShs. 1,568,755.00 as per the Bill of Costs annexed to the supporting affidavit attached hereto.*
2. *That the Respondent do pay the Applicant the said sum of KShs. 1,568,755.00.*
3. *That a charge favouring the Applicant be registered against the title of the estate property namely LR No. 21/1/51 Nairobi.*
4. *That there be interest thereon at Court rates until payment in full of the said sum.*
5. *That the Applicant be paid costs of this application by the Respondent.*

The application is supported by the annexed affidavit of Salah El-Din Amin, Advocate and is based of the on the following grounds-

(a) That a fee agreement exists between the Applicant and Respondent herein in which the Applicant was to bill the Respondent on an hourly basis under the provisions of Schedule V of the then Advocates Remuneration Order 2006.

(b) That the Applicant provided all services described under the said agreement and succeeded in safeguarding the estate and its assets.

(c) That the Respondent has admitted owing the sums billed.

(d) Despite due demand for payment being made and notice of intention to commence proceedings in default thereof being duly made and issued to the respondent she has failed and/or neglected and/or refused to pay the Applicant the said agreed fees hence the filing of this application.

(e) The Respondent is not gainfully employed and has no permanent residency status in Kenya and there is a manifest risk that she may dispose of her property and leave the country permanently once she is in a position to do so and if the orders sought are not granted the Applicant will suffer irreparable and substantial loss.

In his submissions, Mr. Amin told the court that he relied on **Section 45** of the **Advocates Act** and if the court did not agree with him, then he relied on normal contractual principles.

After considering the pleadings and the submissions of respective counsel, I find that this application is based primarily on **Sections 45 & 52** of the **Advocates Remuneration Order. Section 45(1)** is in the following words-

“45. (1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may-

(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate’s remuneration in respect thereof;

(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate’s instruction fee in respect thereof or his fees for appearing in court or both;

(c) before, after or in any course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate’s fees for the conduct thereof; and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.”

It is evident from a copy of the agreement between the advocate and a Client that the said agreement was not signed either by the advocate or her agent duly authorized in that behalf. The said agreement consequently fails to bring itself within the provisions of **Sections 45(1)** and it is therefore unenforceable under that provision of the law. In circumstances like this one where a statute makes an expression provision, it is my considered view that such an expression cannot be overridden by any other principles. The document by e-mail which follows the draft agreement would not validate a document which is not signed pursuant to **Section 45**. What the client said was that she would send back the document duly signed. But she never did so. This only fortifies the position that **Section 45 (1)** was never complied with. In circumstances it is best for the Applicant to proceed to tax his bill.

This application is accordingly dismissed with costs.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 22nd day of November, 2012

**L. NJAGI
JUDGE**